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NO. 83-2168

in the Supreme Court of the United States

OCTOBER TERM, 1983

RUEL A. GALBREATH,

Appellant,

vs.

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA, THE BROWARD COUNTY CLASSROOM TEACHERS ASSOCIATION, INC. and THE PUBLIC EMPLOYEES RELATIONS COMMISSION,

Appellees.

On Appeal from the Supreme Court of the State of Florida

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO DISMISS

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On Appeal from the Supreme Court of the State of Florida

STATEMENT OF THE CASE

This brief is in opposition to Motions to Dismiss filed by Appellee, the School Board of Broward County, Florida, and Appellee, The Broward County Classroom Teachers Association, Inc. The following abbreviations will be used throughout this brief:

Appendix in this Brief A, Appendix in Jurisdictional Statement JSA, School Board's Motion to Dismiss SB, Union's Motion to Dismiss U

The School Board's statement that Galbreath agreed "under protest" to be represented by the CTA and that the Union did represent him in the grievance procedure is incorrect (SB-2,5). Galbreath represented himself in the grievance procedure, with the Union attending as an observer. It is also inaccurate for the School Board to allege that Galbreath had access to an alternate procedure where he could have been represented by his own counsel (SB-12). The Union also controlled access to the final step of the alternate procedure, which did not terminate in arbitration (SB-13, footnote 8). Galbreath's claim was not based entirely on breach of the collective bargaining agreement, it was also based on past practice, which is subject to resolution by an arbitrator.

The Union's representation that its decision not to pursue Galbreath's grievance "was based on its conclusion that the grievance did not constitute a violation of the collective bargaining agreement" is misleading (U-3). Although PERC's summary dismissal of the unfair labor practice charge made such a statement, there was no evidence whatsoever before PERC on which to base that conclusion. In fact, the Union was never required to give any explanation for its bare statement that the grievance lacked merit. (A-1) This Court is not bound by unsupported conclusions of fact by the lower court. In a case cited in the Union's Motion, this Court stated . . . "the view of the facts taken by the Court below, though it is entitled to respect, does not bind us and we may make an independent examination of the record". *Doremus v. Board of Education*, 342 U.S. 429, 432 (1952).

ARGUMENT

I.

FLORIDA PUBLIC SECTOR LABOR RELATIONS IS SUBJECT TO PROVISIONS OF THE UNITED STATES CONSTITUTION AND FEDERAL LABOR LAWS ESTABLISHED BY UNITED STATES SUPREME COURT DECISIONS.

The Union cites *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) and *National League of Cities v. Usery*, 426 U.S. 833 (1976) in support of its argument that since Galbreath is employed by a public school system in Florida, Federal Labor Laws are inapplicable to this case. The Union did, however, acknowledge that this Court would have jurisdiction over this appeal if some right derived from the United States Constitution is threatened (U-6,7).

The *National League of Cities* case can be distinguished on the basis it deals with application of the commerce clause to extend coverage of the Fair Labor Standards Act to State employers. The Court found this displaced the States' abilities to structure employer-employee relationships in areas of traditional governmental functions, such as fire prevention and police protection, etc. Even if clear violations of Galbreath's constitutional rights under the due process and equal protection clause were not present, there would be no basis under *National League of Cities* for excluding Florida from application of Federal Labor Law principles established by decisions of this Court.

In *Abood*, this Court expressly approved the constitutionality of exclusive representation principles in public sector collective bargaining. It would make no sense to say this Court, in *Abood*, can give specific support to the concept of exclusive union representation in the

public sector but it cannot hold public sector unions to the quid-pro-quo duty of fair representation. In *Abood*, this Court expressly imposed the duty of fair representation on the exclusive representative. *Abood* p. 221. The Court also pointed out that the Michigan statute provided for a duty of fair representation. *Abood* p. 224. See footnote 15 p. 261.

With reference to Galbreath's allegation that the Florida Supreme Court failed to follow its own principle established in *City of Tallahassee v. The Public Employee Relations Commission*, 410 So.2d 487, (Fla. 1982), the Union argues this is purely a question of State law. The Union overlooks the fact that this Court has held that a State ground must be supported by prior State practice and not be inconsistent with prior determinations of the State's highest Court. See 32A AmJur 2d, *Federal Practice and Procedure* §674.

II.

APPELLANT GALBREATH HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF SECTION 447.401, FLORIDA STATUTES.

Both the School Board and Union argue that Galbreath lacks standing to challenge the constitutionality of F.S. §447.401. The lack of standing argument was raised by the Appellees below and the same was rejected (A-3, 4, 9).

Despite the School Board's claim that the Union elected to represent Galbreath and treated his grievance precisely as it would have if the exception did not exist (SB-9) the record shows Galbreath proceeded through the grievance procedure representing himself and the Union only sat in as an observer. In fact, the Union's so-called option to elect to represent would only come into effect at the arbitration step since the CTA reserved its exclusive control of the grievance procedure for the arbitration

phase only (A-4). Even the letter from Union representative Lachance indicates the Union did not elect to represent Galbreath in this instance. The Union requested and obtained an extension of time in order for Galbreath to confer with his counsel on whether he wanted to proceed to arbitration with his own legal counsel (A-1). The School Board denied Galbreath due process of law in violation of the Fourteenth Amendment when it refused to permit him to proceed to arbitration in these circumstances. In any event, F.S. §447.401 is unconstitutional on its face and the Union's so-called option, which was created artificially by PERC, doesn't correct the constitutional problems with the statute.

Galbreath, as a non-dues paying member of the CBU, bears the burden that he is treated differently than dues paying members of the unit. This burden alone is sufficient to establish standing. In *Orr v. Orr*, 440 U.S. 268 (1979), this Court struck down an Alabama statute as being in violation of the Equal Protection Clause of the Fourteenth Amendment where the statute imposed alimony obligations on husbands but not wives. On the standing issue, the possibility was noted that appellant's success before this Court may not ultimately bring him relief from the judgment outstanding against him. The Court said:

> There is no question but that Mr. Orr bears a burden he would not bear were he female . . . The burden alone is sufficient to establish standing. Our resolution of a statute's constitutionality often does "not finally resolve the controversy as between th[e] appellant and th[e] appellee," *Stanton v. Stanton*, 421 U.S. at 17. We do not deny standing simply because the "appellant, although prevailing here on the federal constitutional issue, may or may not ultimately win [his] lawsuit." *Id.* at 18.
>
> 440 U.S. at 273

There is no question that Galbreath bears a burden he would not bear were he a member of the union. Although he is not permitted to withdraw from the exclusive bargaining unit, he bears the burden that the Union is not required to extend to him the same representation it is required to extend to union members.

In addition, if Galbreath prevails, he would receive the tangible benefit of being reimbursed for attorney fees he has incurred to vindicate his right, as well as the right of all other non-dues paying members of the certified bargaining unit. The courts have looked favorably upon plaintiffs who vindicate a right shared by all members of the union, especially in cases involving the right to fair representation. *Harrison v. United Transportation Union*, 530 F.2d 558, 564 (4th Cir. 1975) *cert. denied* 425 U.S. 958 (1976).

III.

FEDERAL QUESTIONS WERE TIMELY RAISED BELOW AND THE FLORIDA SUPREME COURT RULED ON THE SAME.

Appellees argue that Galbreath failed to properly raise Federal questions in the lower court. It is difficult to imagine the appellees taking this position when the briefs below clearly show that constitutional issues were raised and argued. See the School Board's answer brief, which was filed in the Florida Supreme Court before oral argument, specifically listing the U.S. constitutional issues (A-7) (See also JSA-42-50; A-2-9) Naturally, the U.S. constitutional arguments were not pressed before PERC with the same force as before the appellate courts because as the School Board pointed out in its Motion to Dismiss, State agencies lack judicial authority to overrule a statute on constitutional grounds (SB-6, footnote 5). The School Board's statement that Galbreath specifically declined to present his Federal constitutional claims to the Florida District Court of Appeals is incorrect (SB-14). The only

claims reserved for the Federal District Court involved §1983 and §1985 issues. The briefs, oral argument and Motion for Rehearing clearly show the Florida Supreme Court gave substantial consideration to the constitutional arguments but in its opinion, decided that said arguments had no merit.

Regarding the requirement that a state court determine a federal question, it is provided in 32A AmJur 2d, *Federal Practice and Procedure*, §668, that:

> . . . . if the record clearly shows that the Federal issue was raised before the trial court by appropriate motions and arguments, and was argued in briefs before both the State's intermediate and highest appellate courts, the Federal question can then be considered by the Supreme Court, despite the lack of a definitive ruling on the issue by the State's highest court.

The *Marshall v. Jerrico*, 446 U.S. 238 (1980) case cited by the Union on the unbiased adjudicator issue can be distinguished in that in *Marshall* there was a right to discovery and a hearing on the Assistant Regional Administrator's determination (U-9,10). In the case at bar, Galbreath had no *right* to a judicial hearing to challenge the Union's decision because PERC denied him a hearing through summary dismissal.

IV.

THE BURDEN OF PERSUASION SHOULD HAVE BEEN SHIFTED TO THE UNION TO SHOW THE BASIS FOR ITS UNEXPLAINED CONCLUSION THAT APPELLANT GALBREATH'S GRIEVANCE LACKED MERIT.

The Union alleges Galbreath has failed to present evidence that the CTA was, in fact, biased against him in such a way that its treatment of his grievance was affected (U-9). The record submitted to PERC included a letter

from Galbreath's principal, which clearly states Galbreath probably would have been negligent had he not used his own discretion in protecting School Board property (JSA-50, 51). The letter alone is sufficient evidence to require the Union to conduct further investigation before refusing to request arbitration. Galbreath submitted a newspaper article to the Florida District Court of Appeal which clearly indicates that an investigation would have shown the School Board had a past practice of paying unauthorized overtime hours (A-2).

A recent decision by the Federal District Court, District of Columbia, lends support to Galbreath's argument that the burden of persuasion should have been shifted to the Union in this case. In *Schapansky v. Department of Transportation, FAA*, 735 F.2d 477, 482 (Fed. Cir. 1984), a former air traffic controller was required to rebut a prima facie case that he participated in a strike. The District Court held that even though the Civil Service Reform Act of 1978 keeps the burden of proof in an adverse action case on the employing agency throughout, the presentation of a strong prima facie case shifts the "order of presentation" to the employee. The Court said this is because the employee is in the best position to present explanatory evidence to counter that prima facie case. The Union certainly is in the best position to present explanatory evidence as to why it failed to request an arbitration hearing after Galbreath instructed it to do so.

A union may refuse to process a grievance for a multitude of reasons, but it may not do so without reason, merely at the whim of someone exercising union authority. A union must use a rational decision making process in refusing to request arbitration. A thorough written statement of the union's reason for not continuing to arbitration is essential to meaningful review of the union's performance. *Public Sector Grievance Procedures, Due Process and the Duty of Fair Representation*, 89 Harv. L.Rev. 752, 787 (1976).

CONCLUSION

This case carries very large issues in the labor law field. The failure of the Florida Supreme Court to declare F.S. §447.401 unconstitutional strikes at the very heart of rights protected by the due process and equal protection clause.

In light of labor law principles established by this Court in *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944) and other cases, it is difficult to conceive of a state being allowed to extend to a union exclusive rights of representation and then to explicitly remove the Union's duty of fair representation to non-dues paying members of the exclusive unit. The State of Florida cannot have it both ways. Even the School Board in its answer brief to the Florida Supreme Court stated that it preferred that public unions be required to cull out *all* unmeritorious grievances, rather than be allowed to simply waive their representation rights (A-8). Either F.S. §447.401 must be struck down as unconstitutional or Galbreath must be relieved from the restrictions of exclusivity and be allowed to proceed to arbitration on his own or with his representative. Not all collective bargaining agreements reserve control of arbitration to the bargaining agent. (A-7) We urge the Court to note probable jurisdiction in this case.

Respectfully submitted,

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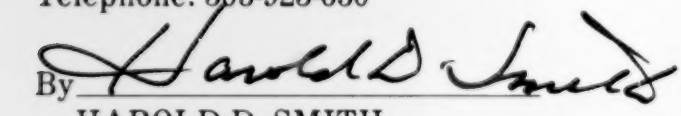
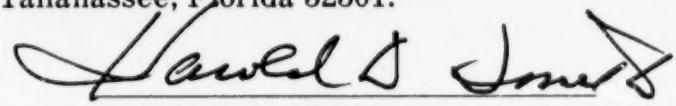
By 
HAROLD D. SMITH

Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 18, 1984, pursuant to Supreme Court Rule 33, three copies of the foregoing Appellant's Brief in Opposition to Appellees' Motions to Dismiss were mailed to: JIM SMITH, Attorney General, State of Florida, The Capitol, Tallahassee, Florida 32301; GORDON DEAN ROGERS, ESQ., Muller, Mintz, Kornreich, Caldwell & Casey, P.A., Attorneys for the School Board, One Biscayne Tower, Suite 1800, Two Biscayne Boulevard, Miami, Florida 33131; MARK F. KELLY, ESQ., Frank & Kelly, P.A., Attorneys for Classroom Teachers Association, 341 Plant Avenue, Tampa, Florida 33606; and PHILLIP P. QUASCHNICK, ESQ., General Counsel, Public Employees Relations Commission, 2600 Blair Stone Road, Suite 300, Tallahassee, Florida 32301.



HAROLD D. SMITH

Counsel for Appellant

Appendix

Appendix A

October 20, 1980

William R. Galbreath
1720 Southwest 48th Avenue
Fort Lauderdale, Florida 33317

RE: Grievance # 69

Dear Mr. Galbreath:

Having reviewed your case referred to above, CTA has decided not to pursue the matter to arbitration since in our judgement it lacks merit.

In an effort to preserve your rights, we have requested and received an extension of the timelines to file for arbitration to October 31, 1980. A letter from Mr. Seigle will confirm.

I would recommend that you discuss this letter with your attorney to determine if you and he would want to pursue the matter on your own.

Sincerely,

/s/ PAUL LACHANCE

Paul Lachance
Assistant Executive Director

PL:al

cc: Mark Seigle
Director, Employee Relations

Appendix B

Excerpt from *FORT LAUDERDALE NEWS* August 28, 1981, entitled "School Maintenance Wasteful-Audit", attached to Galbreath's Reply Brief dated February 22, 1982 and filed in the Florida Court of Appeal

- Maintenance employees work overtime without first receiving permission from an area superintendent or Superintendent William McFatter, as required by School Board policy.

On two weekends, employees logged 370 overtime hours and were paid $5,033 without obtaining prior approval. In addition, Baurmash said he was unable to verify 182 of the overtime hours worked.

Excerpts from pages 23, 24 & 28 of Galbreath's Initial Brief dated November 24, 1981 and filed in the Florida Court of Appeal

It is Galbreath's position that the duty of fair representation is a right arising out of Federal Statutes and case law and that the Florida Legislature cannot remove that duty by simply changing the language of F.S. §447.401.

* * *

F.S. §447.401, on its face, violates federal labor laws establishing a union's duty of fair representation.

* * *

In dicta, however, the Court stated in *Steele:*

> We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates.

Excerpts from pages 1 and 2 of Galbreath's Reply Brief dated February 22, 1982 and filed in the Florida Court of Appeal

The Answer Brief filed by the CTA takes much the same course as PERC's, going hand in hand in trying to convince the court that even if there are constitutional problems with F.S. §447.401, it need not have concern because PERC has interpreted and applied the same to avoid any constitutional infringements.

* * *

Here again, Galbreath takes the position that a statute unconstitutional on its face does not become constitutional based upon PERC's interpretation and application thereof.

* * *

The CTA argues that Galbreath does not have standing to challenge the constitutionality of F.S. §447.401.

Excerpts from Pages 14 and 17 of School Board's Answer Brief dated January 15, 1982 and filed in the Florida Court of Appeal

Accordingly, this Court should find at the outset that Galbreath lacks the requisite standing to challenge the constitutionality of Section 447.401, Florida Statutes (1979) through the instant proceeding.

* * *

Simply stated, the courts have held that a union's status as "exclusive representative" carries with it the concimitant [sic] obligation to fairly represent all members of the bargaining unit—not just favored members of the union.

Excerpt from page 16 of CTA's Answer Brief dated January 15, 1982 and filed in the Florida Court of Appeal

The appellant's lack of standing, *i.e.*, his lack of injury occasioned by the statute he seeks to condemn, also compels the conclusion that there is no justiciable controversy before the Court which would support the constitutional adjudication which the appellant seeks.

Excerpts from page 6 of CTA's Supplemental Brief dated July 30, 1982 and filed in the Florida Court of Appeal

In the present case, the contractual language submitted to the Commission by Galbreath describes a procedure whereby the CTA reserves its exclusive rights solely over the arbitration phase of the grievance procedure.

Excerpts from pages 7, 19, 25, 30 and 31 of Galbreath's Initial Brief dated March 21, 1982 and filed in the Florida Supreme Court

It is respectfully suggested that the case involves substantial constitutional issues as to whether Galbreath's Federal Constitutional rights have been violated and whether his rights under Federal Labor Law have been violated

* * *

The proviso has been applied to Galbreath to deny him equal protection and his due process right to have his grievances heard by an impartial tribunal.

* * *

In relieving the Union of any obligation to process grievances of Galbreath, and all other non-dues paying members, F.S. §447.401 is unconstitutional on its face.

* * *

The effect of F.S. §447.401, coupled with Florida case law, is to allow the Union and School Board to deny Galbreath a right of redress of his greivances guaranteed by the First Amendment to the U.S. Constitution and Article I, Sec. 5, of the Florida Constitution. Denial of Galbreath's access to arbitration, pursuant to the terms of the CBA, also denies him equal access to legal remedies available to dues-paying union members, in violation of rights guaranteed by the First and Fourteenth Amendments to the U.S. Constitution.

Excerpts from pages 1 and 2 of Galbreath's Reply Brief dated May 10, 1983 and filed in the Florida Supreme Court

From reading Respondents' Briefs, consisting of a total of more than 100 pages, it is obvious no one was able to give a logical reason as to why the proviso of F.S. §447.401 should pass constitutional muster. The School Board said it has no great love for the proviso and would prefer that public unions be required to cull out all unmeritorious grievances rather than being allowed to simply waive their representation rights, thus obligating the public employers to proceed through expensive arbitration proceedings against individual employees. (School Board Brief, page 45) The Union likes the proviso and it would like to retain exclusive control of access to arbitration, but at the same time be able to avoid its statutory duty of fair representation to non-dues-paying members of the certified bargaining unit, at its sole discretion. PERC recognizes there may be some problems with the proviso, but it claims to have done its best to construe the proviso to render it constitutional. The plain fact is, the proviso is unconstitutional on its face and it doesn't matter how many different ways PERC interprets the statute, it doesn't change the face of the statute. The statute is unconstitutional because it removes the duty of fair representation from the union for non-dues-paying members of the exclusive bargaining unit

Excerpts from page 16 of CTA's Answer Brief dated April 15, 1983 and filed in the Florida Supreme Court

It must be noted that not all collective bargaining agreements reserve control of arbitration to the bargaining agent.

Excerpts from pages 26, 30, 32 and 45 of the School Board's Answer Brief dated April 13, 1983 and filed in the Florida Supreme Court

In his unfair labor practice charges below and in his brief to this court, Galbreath claims that he had an absolute right to be represented by outside counsel, instead of the Union, in processing his grievance and that he had an absolute right to take his grievance through the contractual arbitration procedure. Denial of these assumed rights by the School Board, the Union and ultimately, PERC, is asserted as: (1) a violation of Galbreath's rights to equal protection and due process of law under the Florida and United States Constitutions; (2) a violation of his right to refrain from being a union member under the First Amendment to the United States Constitution, Article I, Section 6 of the Florida Constitution and Section 447.301(2), Florida Statutes (1979)

* * *

GALBREATH HAS FAILED TO SHOW ANY DEPRIVATION OF EQUAL PROTECTION OF THE LAW OR DUE PROCESS OF LAW

* * *

Galbreath's ancilliary point regarding the First Amendment right to freedom of association is equally without merit. The United States Supreme Court in

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) specifically held that an agency shop provision which required teachers in a non-right-to-work state who did not approve of public unions to pay service charges to an exclusive collective bargaining agent did not violate their right to freedom of association under the First Amendment. Such a direct involuntary association, in and of itself, was held by the Court to be justified by the benefits to all employees of exclusive representation and collective bargaining. Accordingly, the remote and indirect "compulsion" relied upon by Galbreath as establishing a violation of his First Amendment rights is clearly insufficient under the *Abood* precedent. Therefore, in the absence of any violation of the Florida Constitutional provision, no relief can be afforded on Galbreath's claims in this case.

* * *

In both cases, PERC held that in enacting Sections 447.301(4) and 447.501(1)(f), the Legislature intended to follow established precedent under federal law.

* * *

The School Board has no great love for the proviso to Section 447.401 and would prefer that public unions be required to cull out all unmeritorious grievances rather than being allowed to simply waive their representation rights, thus obligating the Public Employers to proceed through expensive arbitration proceedings against individual employees.

Excerpts from pages 22 and 25 of PERC's Answer Brief dated April 15, 1983 and filed in the Florida Supreme Court

GALBREATH LACKS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE PROVISO TO SECTION 447.401.

In addition to addressing the certified question, Galbreath alleges that the proviso to Section 447.401, Florida Statutes (1981), which allows a certified bargaining agent to refuse to process grievances for bargaining unit employees who are not members of the organization, violates Article I, Section 6 of the Florida Constitution, federal labor law, and federal equal protection and due process requirements.

* * *

Galbreath asserts that the proviso to Section 447.401, Florida Statutes (1981), is unconstitutional because it allows certified bargaining agents to treat nonmember bargaining unit employees different from bargaining unit employees who are members of the union in the processing of grievances.